NO. 91-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ESTATE OF FLOYD COWART,
Petitioner,

v.

NICKLOS DRILLING COMPANY and
COMPASS INSURANCE COMPANY,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS NICKLOS DRILLING COMPANY and COMPASS INSURANCE COMPANY[1]

STATEMENT

The statement of the case contained in Petitioner's brief is generally correct, although it is misleading in one respect which may prove significant.

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1. There are no parent or subsidiary companies to be listed for Respondent Nicklos Drilling Company in compliance with Supreme Court Rule 29.1. Respondent Compass Insurance Company is a subsidiary of Armco Steel Corp.

The assertion by Petitioner that Respondent Nicklos failed to pay LHWCA[2] benefits to Cowart after having "acknowledged liability" therefor and being "instructed by the Department of Labor to pay said benefits" [Brief for Pet., p.4], is not correct.

Cowart made a claim against his employer (Nicklos) and its carrier (Compass) for benefits under LHWCA for an accidental injury sustained on July 20, 1983, and also filed a civil suit against a third party in the U.S. District Court for the Eastern District of Louisiana seeking to recover damages for the same accidental injury. The carrier paid Cowart benefits for temporary total disability from the date of the injury until May 21, 1984, when he was released to return to work. These payments were voluntary, pursuant to LHWCA Section 14(a), 33 U.S.C. § 914(a), and no formal compensation award was made. Despite Petitioner's assertion that Cowart was "automatically entitled" to additional benefits, his employer and carrier never acquiesced in any such claim, and no formal claim to such effect or request for hearing thereon was ever presented by Cowart to the Department of Labor after voluntary benefits were terminated and before he had consummated his third party settlement over thirteen months later. Cowart settled his third party suit on July 1, 1985 without obtaining the written approval of the employer or carrier as required by LHWCA Section 33(g), 33 U.S.C. § 933(g).

SUMMARY OF ARGUMENT

The applicable statutory wording addresses the present situation unambiguously. Where a claimant settles a third

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2. Longshore & Harbor Workers' Compensation Act, 933 U.S.C. § 901, *et seq.*

party civil action for less than the LHWCA benefits he would be entitled to receive from his employer, the written consent of the employer and carrier is required; otherwise he forfeits any additional benefits. The only situations to which the "written consent" requirement is inapplicable consist of cases of recovery by judgment in a civil action or in which the claimant settles for more than his employer's compensation liability, and these instances are governed by a separate "notice" requirement. Under no circumstances is a claimant who is subject to the "written consent" requirement entitled to substitute compliance by reference to the "notice" requirement. The statute treats the two situations distinctly.

The effort by the agency administering the statutory scheme to revise its operation by in-house interpretation runs afoul, in this case, of the principle that no construction contrary to plain statutory language is permitted when Congress has directly spoken to the precise question at issue and its intent is clear. The statutory language has been aptly characterized by the Court of Appeals as framing "an unmistakable scheme". Moreover, the agency's lament about hardship for claimants pursuing civil actions without benefit of their LHWCA benefits is unwarranted. The statute expressly provides for the formal prosecution of a compensation claim during the pendency of a civil action, and a summarily enforceable compensation order may be obtained if an employer declines to make voluntary payments at any time.

ARGUMENT

The Court of Appeals has held that Section 33(g) of the LHWCA[3] permits no exception to its requirement that all settlements with third persons that leave the employer liable

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3. 33 U.S.C. § 933(g).

for further compensation benefits must have the prior written approval of the employer and the employer's insurance carrier. In so holding the court below rejected the persistent effort of the Office of Worker's Compensation Programs (OWCP) to delete, or at least dilute, the language of Section 33(g) through an in-house administrative interpretation which has won the relentless support of the Department of Labor's Benefits Review Board (BRB) and which is championed by Petitioner in this Court.

The BRB's seminal case on the issue is *Dorsey v. Cooper Stevedoring Company, Inc.*, 18 B.R.B.S. 25 (1986), in which the Board articulated a construct of Section 33(g) which holds that its two subsections apply to distinct situations: The applicability of Section 33(g), subsection (1), is contingent upon the condition that the employee is receiving LHWCA benefits *at the time* of a third party settlement; otherwise, subsection (2) applies. Furthermore, this construct holds that only a "subsection (1) employee" is required to comply with the "written approval" requirement, whereas a "subsection (2) employee" is given the option of merely notifying his employer and its carrier that he has made such a settlement. *Id.* 18 B.R.B.S. at 29. The BRB rationalizes this construct by interpreting the phrase in the first sentence of § 33(g)(1) -- "person entitled to compensation" -- to mean "one who is receiving compensation payments voluntarily at the time he settles his claim with a third party"; and further by construing the subordinate clauses joined by the conjunction "or" in § 33(g)(2) as affording the employee an option of eschewing compliance with the "written approval" requirement and substituting simple notice to the employer/carrier instead. *Id.*, 18 B.R.B.S. at 29-31.

The Fifth Circuit rejected this construct in *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644 (5th Cir. 1986).

In that case, the BRB had affirmed an Administrative Law Judge's order awarding future compensation benefits to a claimant notwithstanding his failure to obtain written approval of his employer and its carrier of a settlement of a third party liability action. The claimant in *Collier* contended that the requirement of § 33(g)(1) was "suspended" because his employer and the carrier had contractually waived their own subrogation rights against the third party tortfeasor. The Fifth Circuit pointed out that there is nothing in the language of § 33(g) to support an exception to the "unqualified requirement that an employee obtain the consent of the employer and carrier for any settlement with a third party tortfeasor", adding the following comment:

> *** To the contrary, § 933(g)(1) is brutally direct: 'the employer shall be liable for compensation ... *only* if written approval of the settlement is obtained from the employer and the employer's carrier' (emphasis added).

784 F.2d at 647.

Undaunted, the BRB refused to follow *Collier* in the present case, complaining that the Fifth Circuit had failed to consider "[t]he changes made in § 933(g) in 1984 with the addition of § 933(g)(2) and their effect on claimants who were not paid benefits voluntarily or pursuant to an award ***." [Decision and Order of the BRB, J.A. 54.] Actually, the Fifth Circuit expressly discussed § 933(g)(2) in its opinion in *Collier* and found the language of that subsection to be reinforcing of its holding in that case:

> *** As if the language of § 933(g)(1) weren't clear enough, the mandatory nature of the written approval requirement is reiterated in

§ 933(g)(2), *so that the two provisions frame an unmistakable scheme* ***.

784 F.2d at 647 (emphasis added). Moreover, the Fifth Circuit went on in its opinion to quote directly from the legislative history of the 1984 amendments to the LHWCA and observe that it "admits no exception to the written approval requirement". *Id.*[4]

In the court below, the OWCP supported its position by arguing that the essential purpose of § 33(g) is to allow a claimant entitled to LHWCA benefits to receive those benefits and still pursue civil remedies against third persons, and reasoning from this that it is a necessary extension of the congressional intent that claimants who choose to pursue civil actions should not face the financial hardship of having to forego receipt of LHCWA benefits during the pendency of the civil action. The OWCP contends that the actual payment of benefits is the "price" which Congress intended employers to pay for the right of prior approval; thus, settlements require prior written approval only if the employer or its carrier is actually paying benefits at the time the settlement is confected.

A secondary argument made in support of this construction by the OWCP is that the language following the disjunctive "or" in Section 33(g)(2) would be rendered partially meaningless if prior written approval of all settlements were always required, because the alternative of merely notifying the employer of such a settlement would have no function.

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4. There is no indication from the skimpy legislative history pertaining to the 1984 amendment of § 33(g) that Congress was aware of the administrative construction, or of the BRB decisions, at the time it revised the statute.

The decision of this case necessarily requires an examination of the proper method of a court's review of an agency's construction of the statute which it administers. Congress provided for an appeal to the Courts of Appeals as to issues of law decided by the BRB. *See* LHWCA § 21(c), 33 U.S.C. § 921(c). No deference is due to the construction given to the LHWCA by the BRB, since the BRB does not "administer" the statutory scheme. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S.268, 278 n. 18, 66 L.Ed.2d 446, 101 S.Ct. 509 (1980). However, the OWCP, being charged with the administration of the Act, is entitled to such deference--but only with respect to an interpretation which is not unreasonable nor contrary to the purpose of the statute, and further provided that the statute is silent or ambiguous with respect to the specific issue. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). On the other hand, where Congress has directly spoken to the precise question at issue, and its intent is clear, it is the duty of both the court and the agency to give effect to the unambiguously expressed intent of Congress. *Demarest v. Manspeaker*, 498 U.S. ____, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991). It follows that an administrative interpretation of a statute contrary to the plain statutory language is not entitled to deference. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989). Where the statutory language and its meaning is plain, even subsequent reenactment does not constitute an adoption by Congress of a previous administrative construction contrary to the plain meaning of the language. *Leary v. United States*, 395 U.S. 6, 24-25, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); *Demarest v. Manspeaker, supra*, 498 U.S. at _____, 112 L.Ed.2d at 616.

With these principles in mind, it is submitted that the OWCP's supposed rationale for the argued construct of Section 33 finds no room for implication in the wording of the statute. The contention that Congress intended the actual payment of LHWCA benefits to be a trade-off for the right of prior approval is irreconcilable with the language of Section 33, which quite literally provides no exception to its approval requirement. Moreover, it is squarely refuted by the provision of Section 33(g)(2) that LHWCA benefits "shall be terminated, *regardless* of whether the employer or the employer's insurer *has made payments or acknowledged entitlement to benefits* under the chapter." [Emphasis added.]

By the same token, a careful reading of Section 33(g)(2) disproves the OWCP's assertion that the "disjunctive alternative" reading of that section is necessary to avoid rendering the "notification" phrase mere surplusage. Rather, the necessary purpose of this phrase is to extend the notification requirement to those third party recoveries--either by settlement or judgment--to which the prior written approval requirement is inapplicable. The employer/carrier's written approval is of no effect in the case of a *judgment* against a third party, nor is prior written approval required unless the amount of the settlement is "less than the compensation to which the [claimant] would be entitled under this chapter." By virtue of Section 33(g)(2), only notification is required when a claimant either recovers a judgment or settles for an amount exceeding his LHWCA compensation entitlement. In those situations, notification satisfies the employer's only interest in the third party recovery, which is an offset to future compensation liability. *See*, LHWCA § 33(f), 933 U.S.C. § 33(f). Thus, as the Court below stated, the "schemes of approval and notification dovetail perfectly; there is no ambiguity." *Nicklos Drilling Company v. Cowart*, 927 F.2d 838, 832 (5th Cir. 1991) (en banc).

It is submitted that the fallacy of the OWCP's position is demonstrated to be complete when one considers that the proposed construction of Section 33(g) is not necessary to prevent the financial hardship to persons pursuing civil remedies, which the OWCP professes to be its primary concern. Section 33(a), 933 U.S.C. § 933(a), expressly provides that persons entitled to LHWCA benefits need not make an election of remedies, but rather they may receive LHWCA benefits while simultaneously pursuing their civil remedy. If an employer refuses to pay benefits to which the claimant feels he is entitled, then he has a right at any time--notwithstanding the pendency of a civil suit--to pursue his claim to a formal hearing and obtain a compensation order.[5] In the present case, this is what Petitioner's decedent did not do until *after* he had consummated a settlement of his civil action. It was only then that he chose to assert the statutory right which had always been his. As the court below stated,

> To the extent that LHWCA claimants may choose to ignore their rights and responsibilities under section 33, Congress did not and cannot have intended to guard against such self-inflicted hardship.

Nicklos Drilling Company v. Cowart, supra, 927 F.2d at 832. In the present case, Petitioner's decedent slumbered on

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5. Section 19(c) of the LHWCA, 33 U.S.C. § 919(c), provides that "upon application of any interested party" the deputy commissioner in the compensation district where the claim is pending "shall order a hearing thereon". An order either rejecting the claim or awarding compensation must be entered within twenty days after the hearing. Thirty days after the order is filed, it becomes final and summarily enforceable in U.S. District Court pursuant to Section 21, 33 U.S.C. § 921.

his rights for over thirteen months after voluntary payment of benefits was terminated, drawing no compensation and pursuing his civil action to a settlement, all the while charged with the knowledge that the "brutally direct"[6] wording of Section 33(g) would preclude recourse to further benefits under the LHWCA once the civil suit was settled.

CONCLUSION

The Court of Appeals properly rejected the invitation to effectively rewrite the congressional act by adopting the administrative construct contended for by Petitioner, urged by the OWCP and adopted by the BRB. The wording of the statutory provision in issue does not permit any ambiguity concerning the proper resolution of the question presented, nor is there any legislative history suggesting the basis for a judicial gloss upon the unvarnished wording of the statutory provision in issue. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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6. From the Fifth Circuit's opinion in *Collier*, quoted *supra*, 784 F.2d at 647.